Supreme Court, U. S.
MAR 17 1976

In The

Supreme Court of the United States

October Term, 1975

No. 75-1179

THE RUTLAND ENVIRONMENTAL PROTECTION ASSOCIATION, an unincorporated association; FERDINAND RIEDL; EVELYN RIEDL; FRANKLIN SCHNEIDER; MABEL SCHNEIDER; EVERETT McLEAN; NANCY McLEAN; RAYMOND EBERHARDT; MARILYN EBERHARDT; DAVID KOSMEN; MURIEL KOSMEN; FRED LEMON and JOAN LEMON, both individually and as members of the Rutland Environmental Protection Association,

Petitioners,

vs.

KANE COUNTY, an Illinois political subdivision; VERNON DRENDEL SHIRLEY A. DRENDEL; FRED H. AHRENS; FLORENCE M. AHRENS; JOHNSON FARMS INC., an Illinois corporation; CITIZENS BANK & TRUST COMPANY, as Trustee under Trust Number 66-2028; EMIL HOMEYER; ELSIE HOMEYER; CHICAGO TITLE AND TRUST COMPANY, as Trustee under Trust Number 34644; JOHN TURES; HUGH L. MOORE; and FAMILY LEISURE CENTERS, INC., an Illinois corporation,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND JUDICIAL DISTRICT

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REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Introduction

Plaintiff petitioners have characterized this as a case involving questions of law based on "essentially undisputed" facts (Pl. Pet. 6).

On the contrary, the findings of fact made by the Trial Court (Judge Alfred Y. Kirkland), and unanimously affirmed by the Illinois Appellate Court, were determinative of the notice issue presented.

Specifically, the trial and appellate courts found that:

1) All plaintiffs had actual prior notice of the hearing on the zoning amendment involved (Tr. Ct. Op. Appx. 6a*; App. Ct. Op. Pl. Appx. 4a**);

2) All plaintiffs were actually present at the zoning board hearing except those who for personal reasons chose not to attend (Tr. Ct. Op. Appx. 6a; App. Ct. Op. Pl. Appx. 4a);

3) No objections to the proposed amendment were voiced by plaintiffs at said hearing nor were any requests for a continuance submitted (Tr. Ct. Op. Appx. 6a);

4) Plaintiffs were not denied information on the park, but instead were "fully informed at all stages and appeared regularly at various public meetings where

* Appendix to this Response.
** Appendix to Plaintiffs' Petition For Writ of Certiorari.

detailed presentations were given and all questions answered" (Tr. Ct. Op. Appx. 4a; App. Ct. Op. Pl. Appx. 4a);

5) Plaintiffs with the aid of legal counsel and other professional assistance were able to secure two postponements of the vote on the instant zoning amendment and lobby intensively against passage of the amendment for over two months (Tr. Ct. Op. Appx. 3a-5a);

6) Finally, the ordinance was passed by a 23-1 vote of the Kane County Board of Supervisors (Tr. Ct. Op. Appx. 4a).

On these facts, the trial and appellate courts correctly held that plaintiffs were not denied due process and the Illinois Supreme Court denied plaintiffs' petition for leave to appeal.

PLAINTIFFS RECEIVED BOTH ACTUAL AND STATUTORY NOTICE OF THE ZONING HEARING

Plaintiffs' own uncontradicted testimony (A. 117-119) established that all plaintiffs had actual prior notice of the hearing on the instant zoning amendment and that all plaintiffs were actually present at the hearing except those who for personal reasons chose not to attend (A. 117-119, 534). As the trial and appellate courts recognized, plaintiffs can hardly claim lack of due process when the notice challenged actually did what it was supposed to do and they actually knew about and attended the hearing at issue (App. Ct. Op. Pl. Appx. 4a; Tr. Ct. Op. Appx. 6a).

See, e.g., *Sundance Hills Home Ass'n v. Bd. of City Commrs.*, 534 P. 2d 1212 (Colo. 1975); *Perrier v. Board of Appeals*, 134 A. 2d 141 (R.I. 1957); *Cugini v. Chiaradio*, 189 A. 2d 798 (R.I. 1963); 3 Anderson,

American Law of Zoning § 16.23 (1968) and cases cited therein. In *Cugini* the Rhode Island Supreme Court noted at 801:

> "The record here discloses that all of the objectors to the grant of this exception appeared and testified. In such circumstances we are constrained to conclude that they had actual notice of the hearing and that they appeared thereat to make their objections known. *The constitutional question above referred to not having been brought into issue by one whose rights thereunder are alleged to have been violated, the court will not pass upon it.* Newell v. Franklin, 30 R.I. 258, 74 A. 1009." (Emphasis added)

Moreover, plaintiffs concede (Pl. Pet. 9) that the published notice of the zoning board hearing in this case met all the statutory requirements set forth in Ill. Rev. Stats. Ch. 34 § 3158 providing:

> "Amendment of regulations and districts.
> The regulations imposed and the districts created under the authority of this Act may be amended from time to time by ordinance or resolution, after the ordinance or resolution establishing same has gone into effect, but no such amendment shall be made without a hearing before the board of appeals. At least fifteen days notice of the time and place of such hearing shall be published in an official paper or paper of general circulation in such county, and a hearing shall be held in each township or road district affected by the terms of such proposed amendment, except that for the consideration of general amendments to a County zoning ordinance, hearings may be held in the County Court House instead of in each township or road district. . . . 1935 June 28, Laws 1935, p. 689, § 5; 1953, July 6, Laws 1953, p. 857, § 1 — Section 3151 et seq. of this chapter."

This statute has been upheld in at least two prior Illinois Supreme Court decisions,* and reflects the statutory law of all fifty states** and every court decision interpreting said statutes in light of due process. See, e.g., *F. P. Plaza, Inc. v. Waite*, 196 S.E. 2d 141 (Ga. 1973), *cert. den.* 414 U.S. 825, stating (at 144):

> "We hold that such notice by publication of a rezoning hearing to be held by a governing authority of a county is proper and adequate insofar as the requirement of procedural due process and equal protection are concerned. Such notice by publication puts all parties, wherever located, on notice that a public hearing will be held at the stated time and place before the governing authority which is considering an application to rezone land under the jurisdiction of the governing authority. We have held that such notice by publication is all that affected property owners are entitled to, and that their legal or constitutional rights are not violated by the rezoning of property when such notice by publication is given (citation)."

The United States Supreme Court cases cited by plaintiffs (Pl. Pet. 9-13) were not ignored by the trial and appellate courts, they simply do not apply to the facts at bar. *Walker v. City of Hutchinson*, 352 U.S. 112 (1956), involved a landowner's right to receive personal notice of proceedings filed to condemn his own property, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), involved published notice to known trust beneficiaries of the judicial settlement of accounts by the trustee of the trust. *Robinson v. Hanrahan*, 409 U.S. 38 (1972), involved notice of vehicle forfeiture sent to a car

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* *Bohan v. Village of Riverside*, 9 Ill. 2d 561 (1956); *Braden v. Much*, 403 Ill. 507 (1949). See also *Village of Riverwoods v. County of Lake*, 94 Ill. App. 2d 320 (1968).

** See Pl. Appx. 10a-13a.

owner's home at a time the state knew he was in jail. In all these cases, the property of the complainant was directly and immediately affected and his identity and whereabouts were well known. Here plaintiffs' property is not directly affected,* expert testimony showed that any indirect effect will be beneficial (A. 513-515), and the members of plaintiff association were not identified until this litigation began.**

More importantly, *Mullane*, *Walker* and *Robinson*, each involved a party who failed to get notice of an event challenging the notice procedures that failed to inform him. *Here all plaintiffs were informed and had actual notice.* Plaintiffs continue to claim that they were denied information about the park (Pl. Pet. 6-7), but the trial judge, who heard and saw the witnesses, expressly found:

> "[E]vidence in the record clearly establishes that Plaintiffs were fully informed at all stages, and appeared regularly at various public meetings where detailed presentations were given and all questions answered. Plaintiffs stayed completely on top of the situation, literally on a day-to-day basis throughout all of the months that work was being done to put the project in final form for official action.
>
> Plaintiffs lobbied intensively with the Board of Supervisors, urging all of them to cast negative votes on the project." (A. 757) (Tr. Ct. Op. Appx. 4a)

* Plaintiffs' assertion that their homes will suffer substantial depreciation (Pl. Pet. 19) was directly contradicted by defendants' expert appraisal testimony (A. 513-515) and plaintiffs did not even argue value diminution in the appellate court, or in their petition for leave to appeal to the Illinois Supreme Court.

** Plaintiff's complaint (Par. 2, Amended Complaint, A. 4) alleged that REPA had a membership of approximately 100 people, but Defs. Ex. 2 (A.E. 378-380) listed only 84 names.

The Appellate Court concurred in this finding stating:

> "Our review of the record disclosed that there was ample evidence to support the trial court's conclusion that Plaintiffs were informed on the nature of the proposed park." (App. Ct. Op. Pl. Appx. 4a)

Other Illinois statutes referred to by plaintiffs (Pl. Pet. 13) requiring a different mode of notice apply to different situations. Obviously, the statutory requirements for notice of zoning variances in the City of Chicago to persons living within 250 feet of the property* and court jurisdiction over nonresident defendants in a lawsuit** are (and should be) different than published notice of an amendment to a county zoning ordinance. Many principal-plaintiffs lived miles away from the property. Many alleged members of plaintiff association were never revealed until the instituting of this litigation. The statement in plaintiffs' Petition that "the names and addresses of the individual plaintiffs as adjacent and nearby landowners were available and easily ascertainable from the County's plat book and tax records" (Pl. Pet. 8) is patently impossible from this record. And to reiterate, plaintiffs' basic claim that they should have received actual notice is academic to this case since as a matter of undisputed fact they did!

As held by the Appellate Court:

> "Where, as here defendants complied with statutory requirements of notice and plaintiffs had actual notice (many attended the hearing), *plaintiffs were in no way deprived of adequate notice*" (App. Op. Pl. Appx. 4a.) (Emphasis added)

* Ill. Rev. Stats. Ch. 24 § 11-13-7.

** Ill. Rev. Stats. Ch. 100 § 9.

Furthermore, the hearing on the prior general amendments of the Kane County zoning ordinance (Pl. Pet. 16) did not rezone the property in question, and took place before the instant rezoning petition was even filed. Publication of the hearing on these amendments was in two newspapers, the *Elgin Courier* and the *Aurora Beacon* (A.E. 329-334), informed where the entire ordinance was available for public inspection, and was neither "obscure" nor "meaningless to these plaintiffs (Pl. Pet. 17). Both the trial and appellate courts correctly held that the duly published notice of hearing on these general amendments met both statutory and due process requirements. (App. Ct. Op. Pl. Appx. 3a; Tr. Ct. Op. Appx. 5a-6a).*

Plaintiffs' assertion that "notice of 'general amendments' have been expressly condemned by numerous states" (Pl. Pet. 18) is not even remotely supported by the cases they cite (Pl. Pet. 18).**

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* Plaintiffs' assertion that "only FLC stood to benefit from these amendments" (Pl. Pet. 17) is not true. The amendment actually made changes in 14 of the County Zoning classifications, including light industry, farming, residential, multi-family and CUD (A.E. 2-13, Pl. Ex. 2) and would apply to all rezoning petitions subsequently submitted, not only FLC's. It was not even felt that the general amendment was necessary for the passage of FLC's petition (A. 328-329).

** *Federal Building and Development Corp. v. Town of Jamestown*, 312 A. 2d 586 (R.I. 1973); *Hein v. Daly City*, 332 P. 2d 120 (Cal. 1958); and *Trifaro v. Zoning Board of Appeals*, 342 N.Y.S. 2d 95 (N.Y. Sup. Ct. 1973) concern the sufficiency of notice of zoning amendments that actually changed the zoning classification of particular tracts of land. In fact, the *Trifaro* case was reversed at 358 N.Y.S. 2d 74 (N.Y. 1974) (town not named party to suit). *Brachfield v. Sforza*, 114 N.Y.S. 2d 722 (N.Y. 1952) established the right to a building permit. *Glaspey & Sons, Inc. v. Conrad*, 521 P. 2d 1173 (Wash.

(Footnote continued on following page)

Directly contrary to plaintiffs' assertion is *Passero v. Zoning Commission of the Town of Norwalk*, 235 A. 2d 660, 662 (Conn. 1967), *cert. den.*, 390 U.S. 1004 (1968) holding that published notice informing that proposed general amendments were on file and could be examined prior to the hearing in the office of the City Clerk were sufficient "fairly to apprise the plaintiffs of the nature and character of the proposed action."

** *Footnote Continued*
1974) held that notice by publication of a proposed amended ordinance was insufficient when it did not inform that the zoning board planned to and did propose substantial amendments of its own that were not described in the notice and were not made available for public inspection.

CONCLUSION

Notice was upheld in this case since: a) all the statutory requirements for published notice of a zoning hearing were fulfilled; b) all plaintiffs, in fact, received actual notice of said hearing; and c) all plaintiffs who chose to attend said hearing did so.

When the published notice produced actual notice and the presence of plaintiffs at the specific zoning hearing in question, the result is neither "unfair" nor violative of due process.

The Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

DECISION OF COURT FOLLOWING TRIAL AND REVIEW OF WRITTEN BRIEFS

This case was tried to the Court without a jury for nine court days, and counsel for both sides were well-prepared. Written briefs and argument following trial consisted of 226 pages in all and reflected long hours of legal research and careful review of evidence adduced during trial.

Preparatory to dictating this opinion, the Court thoroughly reviewed its own extensive notes taken during trial, from opening statements to conclusion of all the evidence. Counsel agreed to waive closing argument and incorporate same in the written briefs.

In reading and studying the extensive briefs, the Court also outlined arguments and authorities submitted by both sides so that all points raised would receive careful consideration. Thereafter the Court checked out authorities cited on issues it believes were material to this decision.

It is the considered opinion of this Court that Plaintiffs have not sustained their burden of proof on any material issue; and particularly as to Plaintiffs' allegations of fraud and deceit, the Court finds that:

1. *Members of the Kane County Board of Zoning Appeals who voted unanimously in favor of the subject proposal were neither the perpetrators nor victims of fraud and deceit.*

2. *Members of the Kane County Board of Supervisors, who voted 23 to 1 in favor of the subject proposal, were neither the perpetrators nor victims of fraud and deceit.*

The Court therefore finds for Defendants and against Plaintiffs on all issues.

Plaintiffs' motion to add additional parties plaintiff is granted.

Plaintiffs heretofore filed a motion to add additional counts to the complaint. If this has not been previously ruled upon, the motion is granted.

No purpose would be served by an opinion here at the trial court level which undertook to cover and discuss all points raised by both sides. Nevertheless, all points raised by both sides were carefully considered and evaluated.

However, some general and specific further comments may be appropriate.

Plaintiffs' reply brief states that "* * * the case, while complicated in its individual aspects, is, we submit, simple in its broad perspective. Reduced to its essentials, this is a due process case. The issue is thus one of 'fundamental fairness.' * * * For each and all of the issues, the Court should step back from the specifics of each and look at the whole cloth that has been woven. To give judicial sanction to the rezoning process, the Court must be satisfied that the Plaintiffs had a 'fundamentally fair' opportunity to participate in the governmental process which affects them so directly." Plaintiffs' reply brief then makes reference, among other things, to "the complicity between developer and officials and agents of the County all being parts of the whole."

The foregoing could be interpreted as an invitation to the Court to base its opinion on overall total impressions rather than specific points of law argued in Plaintiffs' more than 100 pages of original brief and appendages.

Firstly, the Court believes, after complete review and upon reflection, that Plaintiffs were accorded "fundamental fairness." Secondly, the issues in this case were formed by the pleadings, and this case must be decided on the issues formed by the pleadings.

On the allegation of fraud and deceit, Plaintiffs quote from an Illinois Appellate decision as follows:

"The Courts are without power to inquire into the wisdom of an ordinance or the motives which prompted its enactment *with the possible exception that municipal ordinances may be impeached for fraud by persons injuriously affected thereby.*"

This Court does not disagree with the above-quoted language but is unable to find in the entire record any evidence whatever of fraud and deceit. On the basis of this record, accusations by Plaintiffs, inferences, inferences upon inferences, innuendo and suggestions in questions addressed to witnesses are essentially all that is presented to the Court on the issue of fraud and deceit.

It is the Court's recollection that Plaintiffs called to the witness stand, presumably on the issue of fraud and deceit, no less than six Kane County Supervisors—to testify on the charge that one of the Supervisors in some way attempted to pressure the others or persuade them to vote in favor of Defendant Petitioners' proposal. The Supervisor accused, and all the others, testified that he made no attempt to exert pressure on them, influence their vote or suggest what their vote should be.

Testimony and other evidence adduced throughout the trial established that, to the best memory of all concerned, no zoning petition in Kane County history ever received the extensive study and work that this one did.

From first announcement of the project in Kane County, during May of 1973, and continuously until final approval by the Kane County Board of Supervisors on February 19, 1974, there were numerous public meetings to explain the project, answer all questions and receive suggestions. Staff members in the employe of Kane County worked for months with Defendant Petitioners' professionals and technicians—to work out all details for ultimate presentation to the Kane County Board of Zoning Appeals and the Kane County Board of Supervisors.

On November 28, 1973, the Kane County Board of Zoning Appeals unanimously recommended approval of

the project. The matter then went to the Kane County Board of Supervisors for final action. At the Board of Supervisors level, the matter was deferred to a future date on two occasions, one of the principal reasons therefor being that Plaintiff objectors requested further information. This was provided, and the Kane County Board of Supervisors approved the project by a 23 to 1 vote on February 19, 1974.

It is difficult to impossible for this Court to conclude that approval of this project was accomplished or could have been accomplished by claimed fraud and deceit when the Kane County Board of Zoning Appeals unanimously recommended approval after all those months of work and study and when the Kane County Board of Supervisors approved by a 23 to 1 vote after all those months of work and study.

Plaintiffs claim denial of information, denial of notice and inability to obtain adequate information about the project from May, 1973 through February 19, 1974. However, evidence in the record clearly establishes that Plaintiffs were fully informed at all stages and appeared regularly at various public meetings where detailed presentations were given and all questions answered. Plaintiffs stayed completely on top on the situation, literally on a day to day basis, throughout all of the months that work was being done to put the project in final form for official action.

Plaintiffs lobbied intensively with the Board of Supervisors, urging all of them to cast negative votes on the project.

After the Kane County Zoning Board of Appeals unanimously recommended approval of the project on November 28, 1973, Plaintiffs intensified their lobbying campaign to prevent the Kane County Board of Supervisors from accepting the Zoning Board recommendation. Letters opposing the project were directed to the Daily Courier-News of Elgin, Aurora Beacon-News, a

Marengo newspaper, Chicago Tribune and other newspapers, the Illinois Environmental Protection Agency, the United States Department of Health, Education and Welfare, the Illinois Agricultural Association, the Northeast Planning Commission, Governor Walker, several State Senators and State Representatives and the Kane County Board of Supervisors. A professional planner was engaged by Plaintiffs to prepare opposition letters sent to each member of the Kane County Board of Supervisors.

All the above activity is completely proper in every way, but it tends to contradict contentions by Plaintiffs regarding no notice, inadequate notice and denial of information.

Zoning procedures in Kane County are governed by county ordinances, statutes of the State of Illinois and decisions of the Illinois Appellate Court and Illinois Supreme Court dealing with zoning procedures in Illinois. It is this Court's opinion that Defendant Petitioners meticulously followed procedures specified by county ordinances and State of Illinois statutes, and which were approved by higher courts in Illinois where reviewed on appeal.

Plaintiffs contend, however, that the bulk of these procedures which were followed in the instant case are violative of the "due process" clause of the Federal Constitution.

This Court respectfully disagrees with that contention and believes that authorities cited by Plaintiffs in support of their position on "due process" are not applicable to the facts of this case. For example, one case cited regarding notice required on a zoning petition actually involved a fact situation wherein appellant's property was being taken. The matter of legal notice requirements for taking title to an individual's property is obviously quite different than notice required on a zoning hearing.

The Court cannot adopt Plaintiffs' reasoning in challenging legality of notice on the November 28, 1973 meeting of the Kane County Board of Zoning Appeals, nor is it a determinative issue in this case as the Court reads and interprets pertinent Illinois law. It must also be noted that evidence adduced at trial established beyond question that Plaintiffs received actual notice of the Zoning Board hearing, that a substantial number of Plaintiffs appeared at the Zoning Board hearing and that nobody present raised any objection either before or after the Board voted to recommend unanimous approval of the project.

Plaintiffs also assert that the months of work by officials and staff members of Kane County and representatives of Defendant Petitioners in hammering out a suitable proposal—to protect the interests of persons in Rutland Township and Kane County—constituted "contract zoning" and was therefore legally improper. Surely if no such work had been done, Plaintiffs would have complained—justifiably, in this Court's opinion—that the project was approved without the necessary and appropriate preliminary work and study.

In the opinion of this Court the "contract zoning" contention of Plaintiffs has no application to Community Unit Development or Planned Unit Development zoning. The Court is further of the opinion that Plaintiffs have misconceived in other ways the applicability of a "contract zoning" argument to the facts in this case.

Plaintiffs alleged that their organization consisted of 100 persons, but on depositions they only named 43 individuals. There is disagreement as to whether Plaintiffs' organization, Rutland Environmental Protection Association, ever conducted a formal vote or ever authorized this litigation. The Court's recollection of the testimony is that approval was allegedly given at a meeting in one of the Plaintiffs' homes, where attendance was very substantially less than 43 persons. The Court does not suggest that this is a determinative issue in the case. However, the trial record is also clear that

there were many residents in the area of the proposed project who are very much in favor of it.

Argument has been made in the briefs that Plaintiffs have a "no growth" approach to zoning in Kane County, whereas Defendant Kane County has a "managed growth" approach. There is considerable support in the trial record for this characterization of the situation.

The opposition and concerns of Plaintiffs are most certainly recognized by this Court and not regarded lightly.

Surely some of the Plaintiff farmers in the area would have preferred to see it remain always as exclusively farming.

However, other Plaintiffs moved in and built estate class homes in the area—and no doubt feel very strongly that the area should always be confined to farming and estates.

Then other Plaintiffs moved into the area to live in subdivision homes—and no doubt had and have the wish that the area always remain as farming, estates and residential.

The metropolitan Chicago area is expanding westward. Mere existence of the Route 47 and Tollway intersection, and interchange, guarantees more population, development and activity in the area. Again, the Court does appreciate the intense feeling of Plaintiffs in this matter, but the Court is unable to find—in the trial record and in briefs and arguments—any legal support for the position taken by Plaintiffs in this lawsuit.

Respectfully,

/s/ Alfred Y. Kirkland